Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in Billing	)))	CG Docket No. 04-208

AT&T REPLY COMMENTS

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Pursuant to Section 1.415 of the Commission's rules (47 C.F.R. § 1.415), AT&T Corp. ("AT&T") submits this reply to the comments of other parties in response to the Commission's *Second FNPRM* in these proceedings, proposing further revisions to the Commission's truth-in-billing policies and rules.[1]

PRELIMINARY STATEMENT

The initial round of comments in this rulemaking starkly reveals two fundamental, albeit unsurprising, deficiencies in the case for adopting more prescriptive truth-in-billing requirements than the Commission's current standards.

First, commenters that advocate more detailed truth-in-billing regulation often do not even attempt to provide evidence that such micromanagement of carriers' billing

[1] *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in Billing*, CC Docket No. 98-170 and CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55, rel. March 18, 2005 ("*Second Report & Order*" and/or "*Second FNPRM*"), *published at* 70 FR 30044 (May 25, 2005), *petition for review filed sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-11682-d (11th Cir.). Appendix A to AT&T's instant filing lists the names of other commenters in the initial round.

practices addresses a genuine problem of significant customer confusion regarding the meaning of line item charges on their bills for telecommunications services. Instead, these parties rely on pure *ipse dixit* to support their contention that these additional requirements are needed to protect customers' interests.[2] And even those commenters that make any attempt to document the alleged need for such measures often rely solely on anecdotal evidence.[3]

These parties also frequently cite the raw number of customer complaints filed with the Commission or other bodies regarding alleged billing problems, and the volume of individual customers' comments filed with the Commission in the earlier phase of this proceeding regarding the petition by National Association of State Utilities Advocates ("NASUCA") for a declaratory ruling effectively prohibiting *all* line item charges -- relief that the Commission has categorically rejected.[4] However, as Verizon correctly points out, even if such complaints were meritorious (and there has been no showing in the record that such is the case)[5], their number pales into insignificance when viewed against the immense numbers of subscribers to both wireless and landline services who

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2 *See* Consumer Groups at 7-12; NARUC at 2-4; OCC, *passim*; TOPUC, *passim*.

3 *See* MoPSC at 6; NASUCA at 6-7; Teletruth at 5-9.

4 *See* Consumer Groups at 2; NAAG at 3; NARUC at 2; NASUCA at 2.

5 As the Commission staff has repeatedly acknowledged in its periodic compendia of statistical data on informal complaints, the mere filing of an informal complaint is not evidence of any wrongdoing by the carriers against which those allegations are lodged. *See, e.g.,* FCC News Release, March 4, 2005 (accompanying report for complaints processed by the Consumer & Governmental Affairs Bureau during the fourth quarter of calendar year 2004).

recurrently receive bills from their preferred carriers.[6] In sum, the detailed and extremely burdensome truth-in-billing requirements described in the *Second FNPRM* are the proverbial "solution in search of a problem."

Second, and equally important, none of the commenters that support these new rules has made any demonstration that imposing those additional requirements on carriers is calculated to remedy any alleged customer confusion created by current carrier billing practices. As numerous commenters opposed to these new obligations point out, carriers are already obligated under the Commission's 1999 *Truth-in Billing Order* to render bills to consumers that are clearly organized and that contain full and non-misleading descriptions of the carriers' charges.[7] Where carriers comply fully with these obligations, no benefits to customers result from measures proposed in the *Second FNPRM* such as separating bills into multiple sections for different types of charges and requiring separate line items for each type of charge. But the Commission's proposals are not merely superfluous; rather, as AT&T and other commenters have pointed out, implementing these obligations would require substantial time and impose significant additional costs upon carriers.[8]

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6 *See* Verizon at 6.

7 *See Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999) ("*Truth-in-Billing Order*" and/or "*Further NPRM*").

8 *See* Section I.C, *infra*. Additionally, as increasing numbers of consumers -- most particularly, business customers -- opt to receive their telephone bills electronically via carriers' web sites rather than through paper statements, the paper-based focus of the Commission's rules will, over time, become irrelevant to more and more of those consumers. Such consumers who opt for on-line bills

(footnote continued on following page)

At bottom, commenters that advocate these highly regulatory measures have no faith in competitive marketplace forces, which the Commission has consistently relied upon in its administrative regime since passage of the Telecommunications Act of 1996. There is no basis for the Commission to depart from those principles in the context of truth-in-billing. As AT&T showed (at 8 n. 14), billing is an important attribute that carriers use to differentiate themselves in the marketplace, and those that fail to provide clear and comprehensible bill statements to their customers will quickly find themselves outpaced by more responsive competitors. Other commenters also document the strong incentive these competitive imperatives create to satisfy customer needs for more understandable bill statements.[9] These marketplace factors are clearly superior to a set of costly, highly prescriptive measures that offer no apparent benefits to customers.

Only one aspect of the *Second FNPRM* warrants prompt adoption by the Commission; specifically, a ruling preempting all carrier-specific regulation by states of

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> will have detailed and precise information regarding their bills available to them in a convenient format, since clearly a carrier's web site can provide much more detailed and customer-specific information than can possibly be accommodated in a uniform paper bill. Given the increasing reliance on web-based billing and information distribution, adopting onerous and expensive new paper-based requirements would impose costs on carriers to upgrade a technology whose relevance to many such customers will surely decline significantly over time.

[9] *See, e.g.*, BellSouth at 14 ("In a competitive market, it is in the carrier's own self-interest to treat its customers fairly, before and after the sale of its services"); CCTM at 14 ("In a competitive market, market forces drive suppliers to emphasize customer satisfaction . . . . Marketplace forces, and not government intervention should dictate how carriers structure customer invoicing"); Verizon at 2 ("Additional regulation is not needed because bill clarity and format are competitive issues and carriers have strong incentive to provide clear and accurate bills").

carrier billing practices. The record in the initial round of comments resoundingly confirms that such state regulation is calculated only to balkanize carrier billing practices to the point where it will be virtually impossible to comply with those myriad requirements at any reasonable cost. This result would be seriously detrimental to customers' ability to obtain attractively priced services, as well as inimical to the public interest in preserving a vibrantly competitive telecommunications marketplace. When analyzed under any of the well-established legal standards for preemption, the states' role in regulating carrier-specific billing practices must give way to a set of uniform, federally mandated truth-in-billing standards. Moreover, to preserve such uniformity and avoid creating the same "patchwork quilt" of inconsistent and conflicting rules that makes preemption of state regulation imperative, the Commission should reject subdelegating enforcement of its own truth-in-billing standards.

I. THE COMMENTS DEMONSTRATE THE *SECOND FNPRM*'S PROPOSED REQUIREMENTS FOR LINE ITEM FEES AND OTHER CARRIER BILLING PRACTICES ARE UNNECESSARY TO PROTECT CONSUMERS AND WILL DISSERVE CONSUMER WELFARE.

A basic tenet of administrative law is that agency rulemaking must be grounded upon reasoned analysis and based on "substantial evidence in the administrative record" to support the regulations adopted in such a proceeding.[10] As AT&T demonstrates below, the administrative record here offers no basis for the Commission lawfully to

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[10] *See* Administrative Procedure Act, 5 U.S.C. § 553; *AT&T Corp. v. FCC*, 394 F.3d 933 (D.C. Cir. 2005); *BFI Waste Systems v. FAA*, 293 F.3d 527, 528 (D.C.Cir. 2002); *Airline Pilots Ass'n v. Dep't of Transportation*, 3 F.3d 449, 453 (D.C. Cir. 1993).

adopt any of the *Second FNPRM*'s proposals for imposing additional prescriptive truth-in-billing obligations on carriers.

A. "Government Mandated" and "Non-Mandated" Charges

The voluminous initial filings in response to the *Second FNPRM* are largely devoted to the "issue" of how the Commission should define "government mandated" line items. However, as AT&T explained (at 6-7), determining the definition of that term is unnecessary because the sole purpose of that exercise is as a predicate to requiring carriers to place "government mandated" line items, however defined, in a section of their bills separate from other, "non-mandated" line item charges. Yet neither the *Second FNPRM* nor the commenters that support imposition of this requirement have provided a reasoned basis for the conclusion that requiring such separate bill sections is calculated to promote greater comprehension of line items charges.[11] Indeed, the MoPSC candidly concedes that "separating government mandated charges from all other charges does *not* satisfy the goal of providing consumers access to accurate, meaningful information."[12]

Standing alone, the absence of any such support precludes adoption of this proposal. Moreover, as numerous carriers point out in their comments, requiring separate sections in customer bills is not merely superfluous. Rather, it would require substantial time for carriers to revise their billing systems at significant cost to accommodate this

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[11] *See* Consumer Groups at 9; NAAG at 9; NARUC at 2-3; MoPSC at 6; NASUCA at 12-13.

[12] *See* MoPSC at 5 (emphasis supplied).

new requirement. For example, MCI estimates that creating separate bill sections would take at least twelve to eighteen months to complete, at a cost of at least $5.3 million for system changes alone.[13] Other carriers similarly estimate that the separate bill section requirement would be time-consuming and costly to implement.[14] Given the absence of any perceptible benefit to customers that separate bill sections would produce, and the serious burdens that this requirement would impose on carriers, it would clearly be unreasonable for the Commission to prescribe this obligation.

If the Commission nonetheless decides to adopt this measure, it must at least also adopt a rational definition of the term "government mandated" line item charges. The narrower of the two alternatives described in the *Further NPRM* (at ¶40) -- i.e., "amounts that a carrier is *required* to collect directly from customers" to remit to governmental bodies -- is far too restricted to satisfy the Commission's obligation to engage in reasoned decisionmaking. As the *Further NPRM* itself acknowledges (*id.*), and as AT&T also

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[13] *See* MCI at 3-4. Moreover, MCI notes (at 5) that its cost estimate does not take into account the additional expense of training its customer service personnel to answer customers' questions about the new billing format. AT&T and other carriers would likewise have to incur such training expenses to provide proper customer support to their own subscribers.

[14] *See* SBC at 9 (estimating that compliance with separate billing section requirement would take ten to twelve months, at a cost of $1.6 million). *See also* Associations at 2; BellSouth at 8-9; CCTM at 15-16; Dobson at 8-9; Sprint at 15; Nextel at 4-8; US Mobility at 10.

Moreover, as Sprint (at 15) correctly points out, it may be infeasible to implement new billing formats and language prescribed by the Commission for all of the carriers' customers, because some of their billing functions are performed by other entities over which the carriers have only limited control. For example, independent telephone company ("ICOs") perform some of AT&T's billing functions in certain service areas.

pointed out,[15] such a definition of governmentally mandated charges would exclude virtually *all* line items that are currently assessed upon customers.[16] This would effectively accomplish the same result that NASUCA sought through its declaratory ruling petition, which the Commission categorically denied in the *Second Report & Order* that it adopted concurrently with its initiation of the present rulemaking. It should therefore come as no surprise that NASUCA and other commenters in this proceeding that support the NASUCA position have supported adoption of the narrow definition of "government mandated" line items described in the *Second FNPRM.*[17]

The only sensible definition of a "government mandated" line item charge is the alternative description identified in the *Second FNPRM*: namely, whether the amount collected through the charge" is remitted directly to a governmental entity or its agent."[18] As the Commission recognized there,[19] and as AT&T has also demonstrated,[20] this definition is sufficiently broad to encompass line item charges for expenses such as the Universal Service Fund ("USF"), which are indisputably related to a governmental program and are remitted in full to a governmental body (or, in the case of the USF, to

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15 *See* AT&T at 6 n.10.

16 The only line items that the *Further NPRM* identifies as comprehended by the restrictive definition are those for state and local taxes, federal excise taxes on communications services and some state E911 fees. *Id.*, ¶ 40.

17 *See* Consumer Groups at 7; MoPSC at 3-5; NAAG at 7; NARUC at 3-4; NASUCA at 3-12; TOPUC at 2-4.

18 *See Second FNPRM*, ¶ 41; BellSouth at 10; SBC at 8; Qwest at 10-11.

19 *See id.* and n. 123.

20 See AT&T at 6-7.

the Universal Service Administrative Company ("USAC") which acts as the Commission's agent for collecting universal service assessments from carriers).[21] Such charges that bear a close logical and legal nexus to government programs and are remitted to governmental bodies, but which carriers have the option to charge, are every bit as legitimately "government mandated" charges that carriers are required by government to assess as line items. In either case, the revenues generated by the line item charge are remitted in full to governmental bodies. And, so long as the carrier assessing charges in either category describes those line items in a clear and non-misleading manner as required under the Commission's existing truth-in-billing obligations, there is no need for the Commission to create a false dichotomy between "mandated" and "non-mandated" line items.

B. Standardized Labeling of Line Item Charges

As the *Second FNPRM* itself recognizes,[22] and as many comments confirm,[23] the proposal to adopt standardized labels for line item charges potentially violates important

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21 Under the Commission's *USF Contribution Order* released in 2002, line item charges for USF cost recovery are permissible but are limited to the contribution factor used to calculate a carrier's obligations to that fund. *See Second FNPRM* at ¶¶ 8-10, *citing Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24,952 (2002). Carriers may also recover their administrative and other costs related to the USF line item, but they may do so only through a rate element separate from the USF charge. *Id.*, 17 FCC Rcd at 24,977-80.

22 *See Second FNPRM*, ¶ 52.

23 *See* CCTM at 20; MCI at 9-11; Nextel at 9-15; USCC at 5-6; Verizon at 12-17; Verizon Wireless at 41-45.

constitutional protection for accurate, non-misleading commercial speech.[24] The Supreme Court in its *Central Hudson* decision articulated the test for assessing the lawfulness of government regulation of commercial speech.[25] That standard requires (i) that "the regulatory technique [is] in proportion to [the governmental] interest;" (ii) that "[t]he limitation on expression [is] designed carefully to achieve the [government's] goal;" (iii) that "the speech restriction directly and materially advances the governmental interest asserted;" and (iv) that the speech restriction "is not more extensive than is necessary to serve that interest."[26] Moreover, the party supporting a restriction on commercial speech bears the burden of justifying that limitation, and may not discharge that obligation "by mere speculation or conjecture."[27] Particularly in light of the absence of a factual record to support the need for standardized labeling, and the availability of Commission enforcement action against violations of current truth-in-billing standards, the commenters cited above contend that standardized labeling cannot pass constitutional muster under the *Central Hudson* criteria.

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[24] Sprint (at 21-22) and Verizon (at 13-15) also point out that the carriers' descriptions of line item charges reflect matters of public concern that may be subject to the even stricter constitutional scrutiny accorded to political speech.

[25] *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[26] *Id.* at 564, 566.

[27] *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

The fact that such critical First Amendment issues pervade the standardized labeling proposal has been evident since the Commission first put it forward in 1999.[28] As even parties in this current rulemaking that do not oppose that measure recognize, [29] the lawfulness of compelling carriers to use such labels is virtually certain to require years of litigation to fully resolve. It is neither necessary nor appropriate for the Commission to enmesh itself in such a morass because the Commission's current truth-in-billing requirements are more than sufficient to protect subscribers' legitimate interest in non-misleading descriptions of their line item charges. There is nothing inherently inimical to customers in permitting variation among carriers in the manner in which their line item charges are described. To the contrary, the *Truth-in-Billing Order* adopted "broad, binding principles" to govern carrier billing practices because the Commission recognized that "there are typically many ways to convey important information to consumers in a clear and accurate manner."[30]

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[28] *See* Dissenting Statement of Commissioner Furchtgott-Roth in *Truth-in-Billing Order and Further NPRM*, p. 2 ("Regulation of descriptions for charges when there is nothing factually inaccurate about the carriers' statements -- but their description does not reflect the government's preferred explanation of charges -- raises grave First Amendment questions").

[29] *See* Qwest at 7 n. 15.

[30] *See Truth-in Billing Order*, ¶ 9 ("[W]e envision that carriers may satisfy these obligations in widely divergent manners that best fit their own specific needs and those of their customers").

As an alternative to the problematic approach of mandating specific labels for line item charges, several commenters have put forward a salutary proposal that the Commission adopt descriptions of certain of those charges which would provide a "safe harbor" for carriers that elect to adopt those labels. *See* BellSouth at 3, 13; CCTM at 7-8; Sprint at 19. Under this procedure, carriers would still be

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In all events, moreover, as a practical matter it would be all but impossible for the Commission to prescribe appropriate labels for the entire range of line item charges that carriers currently employ. Indeed, at least one commenter questions whether the Commission possesses adequate resources or sufficient marketing expertise to adequately determine the appropriate labels for many of those charges.[31] Moreover, adopting this approach will necessarily embroil the Commission perpetually in new rulemakings as carriers seek to implement new line item charges in response to developments in the rapidly changing telecommunications marketplace.[32]

C. Combining Regulatory Charges in One Line Item

As AT&T showed in its Comments (at 10-11), there is nothing inherently improper in a carrier's combining two or more regulatory charges in a single line item, so long as the carrier's description of those costs in the line item complies with the Commission's existing truth-in-billing standards (i.e., that the statement is clear, accurate and non-misleading). The comments that nevertheless support the proposal to eliminate combining such charges in one line item simply fail to surmount this logical inconsistency, or even to provide a credible explanation how this

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> permitted to determine their own labels for the line items in question, so long as they otherwise comply with the Commission's truth-in-billing principles that those descriptions be clear, accurate and non-misleading. Such an approach could potentially mitigate the constitutional law controversy that surrounds the prescription of mandatory uniform labels.

31 *See* Qwest at 5.

32 *See* MCI at 8.

measure will contribute to consumer welfare.[33]

Moreover, once again the record demonstrates that compliance with this unnecessary requirement would impose undue burdens on carriers. While disaggregating these charges into separate line items would require time-consuming and costly modifications to carriers' billing systems,[34] these are not the only compliance obstacles carriers would encounter. Carriers often already have limited space in their customer billing statements. Proliferating separate line items to reflect individual regulatory costs that are now combined in one such line thus will also seriously complicate carriers' ability to accommodate these charges within the confines of their bills.[35] Finally, like AT&T (at 11 n.21), other commenters also recognize that requiring separation for all line item charges may promote, rather than reduce, the complexity of bills and consequent customer confusion.[36]

D. Point of Sale Disclosure

The most onerous aspect of the *Second FNPRM* is its proposal to require extensive, detailed disclosures to customers at the "point of sale" (*e.g.,* in a telemarketing call) concerning a carrier's charges prior to establishing a carrier-customer contractual relationship. Such required disclosures would include not only the "full rate" of the carrier's offerings but also disclosure of the charges for "any non-mandated line items"

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33 *See* Consumer Groups at 11; NASUCA at 20-21.

34 *See* MCI at 7.

35 *See* Cingular at 14.

36 *See* CCTM at 21-22.

and a "reasonable estimate of government mandated surcharges." However, as AT&T (at 11 n. 21) and other commenters have shown,[37] accurately providing the required information about either type of line item would in many cases be problematic because those charges are dependent upon the customer's monthly usage of telecommunications service or other variables.[38] Carriers would be forced to provide fairly broad (and potentially meaningless) reasonable ranges or estimates of these items and other service charges to potential customers.[39]

At least equally important, like AT&T, other commenters point out that requiring carriers to provide such detailed disclosures to potential customers at the point of sale as a predicate to accepting their service orders would in many cases prolong the transaction contrary to the customers' wishes, and inflict substantial inconvenience and annoyance

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37 *See* BellSouth at 15-16; CCTM at 10-11; MCI at 11; SBC at 10; USTA at 5; Verizon at 7-9.

38 For example, the USF contribution factor (which establishes the maximum charge for a line item recovering that cost) can vary from one calendar quarter to the next. Nor is such variation confined to nationally uniform assessments on carriers; 911 fees can vary from county to county. *See* USTA at 5; USCC at 8. Line item charges for taxes vary not only by the taxing jurisdiction, but also by the type of customer (*e.g.*, subscribers to Lifeline service) upon whom the taxes are assessed. *See* Verizon at 9. And carriers' rates for international service vary by the call destination, among a host of other factors such as time of day. *See* CCTM at 11.

39 But even providing such estimates would be seriously burdensome (if not, indeed, impossible) for carriers because they would have no established business relationship with a potential customer -- and, thus, no prior experience -- upon which to base any estimate of charges, especially those that are usage sensitive. *See* BellSouth at 15-16; MCI at 12; *see also* Sprint at 22 (stating the Commission should not require disclosure "beyond the information reasonably available to carriers").

upon those potential subscribers.[40] At a bare minimum, therefore, the Commission should make clear that carriers may offer customers the option to elect these detailed disclosures, and that carriers are not required to provide that information at the point of sale if the customer declines to receive it at the time of contract formation. This modification of the Commission's proposal will not deprive customers of access to necessary information about the rates, terms and conditions of their service. As the record here shows, [41] carriers routinely make such information available for convenient access by their current and potential customers by posting those data on their Web sites and by other methods.[42]

II. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD PREEMPT ALL STATE REGULATION OF CARRIERS' BILLING PRACTICES AND PRECLUDE STATE ENFORCEMENT OF THE COMMISSION'S TRUTH-IN-BILLING REQUIREMENTS.

In its *Second Report & Order* in this proceeding, the Commission found that

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40 *See* AT&T at 12-13; CCTM at 10-11; MCI at 11; SBC at 10.

41 *See* AT&T at 9 n.16, 10 n. 19; SBC at 10.

42 For example, AT&T posts on its Web site its customer service agreements and service guides for both residential and business subscribers. *See* http://www.serviceguide.att.com/ACS/ext/index.cfm (residential services); http://www.serviceguide.att.com/ABS/ext/index.cfm (business services). The Web site also provides links to AT&T Tariffs F.CC. Nos. 29 and 30, which govern up AT&T's interstate offerings for up to 30 days after a customer's initial order. *See* http://www.serviceguide.att.com/ACS/ext/doc/FC05%2D6%2D301%2Epdf (Tariff F.CC. No. 29 for residence services); http://www.serviceguide.att.com/ABS/ext/doc/Tariff%2030%20SG%20Master%20v30%2Edoc (Tariff F.CC. No 30 for business services). Moreover, the "welcome packages" that AT&T provides to customers following subscription to its services provide information about the terms and conditions of those offerings in "hard copy" form.

Section 332 of the Communications Act (47 U.S.C. § 332) preempts state regulations requiring or prohibiting billing of line item charges by Commercial Mobile Radio Service ("CMRS") providers.[43] In light of that ruling, the *Second FNPRM* tentatively concludes that the Commission should also preempt all state billing practices regulations that are inconsistent with federal truth-in-billing rules, guidelines and principles, both for CMRS providers and wireline carriers.[44] The Commission reaches this tentative conclusion on the basis that "a uniform, nationwide, federal [truth-in-billing] regime will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."[45]

The record compiled in the initial comment round clearly demonstrates the correctness of the Commission's preliminary finding about the pernicious impact of state regulation of truth-in-billing on carriers, their customers, and on the public interest in preserving and furthering a vigorous competitive telecommunications marketplace. Carriers have documented in detail in this proceeding the serious and increasingly

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43 *See Second Report & Order*, ¶¶ 30-37.

44 As the Commission noted both in the *Second Report & Order* (¶ 33) and in the *Second FNPRM* (¶ 53), this determination will not preclude states from enforcing their own generally applicable contractual and consumer protection law and rules, even as applied to carriers' billing practices. It will, however, preclude state promulgation of carrier-specific billing practices that are not subject to those other, broadly applicable state legal requirements.

45 *See Second FNPRM*, ¶ 52.

adverse effects caused by balkanization of their billing practices under state regulation.[46] The comments also demonstrate that, to achieve its policy objectives d, the Commission should not simply preempt state rules that are inconsistent with its truth-in-billing regime, but should preempt *all* carrier-specific state regulation of billing practices. Moreover, the Commission should not confer enforcement of federally-mandated truth-in-billing rules and policies on state authorities, because such subdelegation is legally impermissible and, in all events, would undermine the Commission's goal of uniform regulation of carriers' billing practices.

A. There Is Ample Legal Basis for the Commission to Preempt Carrier-Specific Billing Regulation by States.

The Commission's legal authority to preempt inconsistent state regulations that conflict with and frustrate the accomplishment of the federal regime is already well-established.[47] But even in the absence of a direct conflict between state and federal rules, as the Commission's 2004 *Vonage Order*[48] recognized, there are additional well-established legal grounds for asserting federal preemption even of state law regimes that present no direct inconsistency with federal obligations. One of these is where it is

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46 *See* BellSouth at 3-4; Cingular at 12-18; CCTM at 5-8; CTIA at 18-29; Dobson at 4-6; MCI at 12-13; Nextel at 25; SBC at 11-14; Sprint at 8; T-Mobile at 11-16; USCC at 9; USAM at 3-7; Verizon at 18-20; Verizon Wireless at 10-16.

47 *See, e.g., Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1993); *Public Util. Comm'n of Texas v. FCC,* 886 F.2d 1325 (D.C. Cir 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir 1989).

48 *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004) ("*Vonage Order*").

impossible, as a practical matter, to separate the service that is the subject of regulation into interstate and intrastate components, and state regulation would thwart or impede the Commission's exercise of its authority over the interstate portion of the service and the effectuation of congressional objectives.[49]

That predicate is satisfied here because, as other commenters point out, carriers are increasingly moving to satisfy consumer needs by providing "bundled" service offerings that combine long distance, local toll and local calling into a single plan at one charge.[50] It would be impracticable to apply both federal and state truth-in-billing rules to such combined plans without also requiring carriers to "unbundle" their charges for such plans into separate interstate and intrastate components – which would deprive customers of the very simplicity and convenience that bundled offerings provide.[51] At a bare minimum, separating carrier bills in this manner would create additional costs for carriers that would substantially inhibit the further deployment of those bundled offerings and thereby chill the marketplace competition that is a principal objective of the

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49 *See Louisiana Pub Serv. Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986), *citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 and *Hines v. Davidowitz*, 312 U.S. 42 (1941); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

50 *See* BellSouth at 7; SBC at 9 n.20; Verizon at 18. For example, AT&T has Unlimited and Unlimited Plus calling plans that provide customers the capability of multijurisdictional calling for a single monthly charge.

51 *See* BellSouth at 7.

Telecommunications Act of 1996. In analogous circumstances, the *Vonage Order* recognized that preemption of state regulation is both permissible and necessary.[52]

B. Delegating Authority to States to Enforce the Commission's Truth-in-Billing Requirements Raises Serious Issues of Lawfulness And Would in All Events Be Unsound Regulatory Policy

The initial comment round also underscores AT&T's showing (at 17-19) that the Commission should reject conferring any role on state regulatory agencies to enforce truth-in-billing rules prescribed by the Commission. States may, of course, adopt and enforce generally applicable contractual and consumer protection laws and rules, but they have no legitimate basis for acting as enforcers of the Commission's own carrier-specific billing requirements.

As a threshold matter, several commenters -- including, notably, NASUCA itself -- note that it is, at best, questionable whether the Commission has the legal authority to subdelegate to state regulators enforcement of its current truth-in-billing rules or any additional regulations that may be adopted as the result of this rulemaking.[53] Only last year, in vacating in part the Commission's *Triennial Review Order*, the D.C. Circuit unequivocally held that "A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to

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[52] See *Vonage Order*,¶ 23 (noting that "the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers") (footnote omitted).

[53] *See* CTIA at 35-37; NASUCA at 16-18; Sprint at 11-14; USAM at 8-9.

subdelegate that authority beyond federal subordinates."[54] Nothing in the text of Section 201(b) of the Communications Act, upon which the Commission's truth-in-billing regime is grounded, expressly grants the Commission authority to subdelegate enforcement of those requirements to state regulatory agencies or any other non-federal entity. Moreover, to whatever extent it might be permissible to look beyond the plain words of that statute, neither the *Second FNPRM* nor any commenter has provided any showing that Congress intended to permit the Commission to subdelegate enforcement authority in this manner.[55] Thus, it is highly probable that any such action by the Commission will result in a challenge in federal courts, which at a minimum will create substantial uncertainties about the legality of the enforcement scheme until the litigation is finally resolved.

In all events, moreover, as a matter of sound regulatory policy, subdelegating enforcement authority for the Commission's truth-in-billing requirements would seriously disserve the Commission's stated goals of achieving nationwide uniformity in the interpretation and application of its carrier billing rules and policies. Experience with

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[54] *See USTA v. FCC*, 359 F.3d 554, 565-56 (D.C. Cir.), *cert denied*, 125 S. Ct. 345 (2004) (emphasis in original).

[55] The *Second FNPRM* notes (at ¶ 53 and n. 152) that the Commission has subdelegated enforcement authority to state utility commissions that elect to enforce its rules against slamming (the unauthorized change of an end user's preferred local or long distance carrier). *See* 47 C.F.R. § 64.1110. However, as USAM observes (at 8) Section 258 of the Communications Act under which the Commission's slamming rules are promulgated expressly provides that this section of the Act does *not* "preclude any State commission from enforcing [the federally prescribed] procedures with respect to intrastate services." *See* 47 U.S.C. § 258(a). Whether even this statutory language is sufficient to support the Commission's subdelegation of slamming enforcement is an open question; as Sprint correctly points out (at 12), to date no court has addressed the lawfulness of the Section 64.1110 slamming enforcement scheme.

state enforcement of the Commission's slamming rules demonstrates that subdelegation is antithetical to those objectives. AT&T showed that state commission interpretations of the slamming rules have conflicted in important respects with the Commission's own requirements, and also vary from state to state.[56] Other commenters similarly confirm the absence of uniformity in the states' application of Commission slamming rules.[57] There is no basis for the Commission to reach a predictive judgment that state interpretation and enforcement of the Commission's truth-in-billing regime would not lead to the same hodgepodge.

Only last month, the Commission pointedly concluded that such disparate state enforcement is anathema to orderly administration of federally-mandated requirements for digital wireless handsets. The Commission there asserted its exclusive jurisdiction over whether such handsets comply with its hearing aid compatibility standards.[58] Otherwise, one state commission's finding that a handset is noncompliant with those standards "would effectively be making a determination for the entire nation.[59]" Alternatively, "if different states came to different conclusions on whether a particular

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[56] *See* AT&T at 18 and n. 27. In particular, state commissions frequently have found that slamming has occurred because the change request was based upon a carrier's good faith reliance on interactions with persons with apparent, but not actual, authority from the subscriber. However, properly verified carrier change orders may be submitted where the carrier deals with persons with apparent authority. *See AT&T v. FCC*, 323 F.2d 1081 (D.C. Cir. 2003).

[57] *See* Sprint at 13 n.42.

[58] *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 05-122 (rel. June 21, 2005).

[59] *Id.*, ¶ 57 (footnotes omitted).

handset complies with our rules, manufacturers and carriers might have difficulty continuing to provide service at all."[60] Comments by other parties in this proceeding likewise show that it is readily foreseeable that these same consequences can be expected to flow from any Commission decision subdelegating enforcement of federal truth-in-billing requirements to state regulatory commissions.[61] Such a regime would undermine the very goals that the Commission has properly sought to achieve through its tentative conclusion that carrier-specific regulation of end user billing standards should be preempted. Nothing in law or logic permits, much less requires, the Commission to engage in such "back door" subversion of a preemption ruling.

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60 *Id.*

61 *See* CTIA at 34-35; Sprint at 13.

CONCLUSION

For the reasons stated above and in AT&T's initial comments, the Commission should decline to adopt the various additional carrier-specific revisions to its truth-in-billing rules described in the *Second FNPRM*, should preempt all state regulation of carrier billing practices, and should not authorize state regulatory agencies to enforce the Commission's truth-in-billing rules, guidelines and principles.

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APPENDIX A

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Arizona Corporation Commission ("Arizona")
BellSouth Corporation ("BellSouth")
Cingular Wireless LLC ("Cingular")
Coalition for a Competitive Telecommunications Market (CCTM)
CTIA – The Wireless Association ("CTIA")
Dobson Communications Corporation (Dobson)
MCI, Inc. ("MCI")
National Association of State Utility Consumer Advocates ("NASUCA")
National Association of Regulatory Utility (NARUC)
Nextel Communications, Inc. and Nextel Partners, Inc. ("Nextel")
National Telecommunications Cooperative Association, The Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance (Associations)
Oklahoma Corporation Commission ("OCC")
Public Service Commission of the State of Missouri ("MoPSC")
Qwest Corporation, Qwest Communications Corporation, Qwest LD Corp. and Qwest Wireless LLC ("Qwest")
SBC Communications, Inc. ("SBC")
Sprint Corporation ("Sprint")
Teletruth
Texas Office of Public Utility Counsel ("TOPUC")
T-Mobile USA, Inc. ("T-Mobile")
United States Cellular Corporation (USCC)
USA Mobility, Inc. ("USAM")
United States Telecom Association ("USTA")
Verizon
Verizon Wireless

CERTIFICATE OF SERVICE

I, Tracy Lea Paulsen, do hereby certify that on this 25th day of July, 2005, a copy of the foregoing "AT&T Reply Comments" was served by U.S. first class mail, postage prepaid, on the parties listed below.

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